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Supreme Court of the United States

October Term, 1962

No. [redacted] 4

ROBERT WILLIAMS,

Petitioner,

against

STATE OF NORTH CAROLINA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

MEMORANDUM FOR THE PETITIONER

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MEMORANDUM FOR THE PETITIONER

This memorandum is submitted in response to the Court's request for a memorandum "as to whether or not there is a statute, ordinance or executive order requiring discrimination on the basis of race."

Although there is no explicit statutory directive requiring the proprietor of a drugstore to discriminate against Negroes in the service of food at a lunch counter, the State of North Carolina has enacted a host of laws requiring discrimination on the basis of race which effectively mandate a state policy of segregation. In addition, there are local ordinances which mandate segregation. A summary of these laws was submitted to this Court in petitioners'

brief in *Avent, et al.* v. *North Carolina*, 373 U. S. 375. For the convenience of the Court, we restate this summary.[1]

Most of the city and state segregation laws were enacted about the turn of the twentieth century.[2] These state and city imposed requirements govern not only activities furnished by the state but privately-owned facilities as well. The subordinate role to which the segregation laws relegate Negroes is well illustrated by the national guard statute, N. C. Gen. Stat. § 127–6: "No organization of Colored Troops shall be permitted where White troops are available, and while permitted to be organized, colored troops shall be under command of white officers."

While the state has repealed statutes requiring segregation in the public schools, school segregation continues to be enforced by other means.[3] Mental institutions,[4] orphan-

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[1] Petitioners in *Avent, et al.* v. *North Carolina*, *supra*, refer to a report of *The Statutes and Ordinances in the State of North Carolina Requiring Segregation*, made by the North Carolina Advisory Committee to the United States Commission on Civil Rights, hereinafter referred to as the "Advisory Committee". This report originally appeared in mimeographed form. Subsequently it was printed in a publication entitled *Equal Protection of the Laws in North Carolina—Report of the North Carolina Advisory Committee to the United States Commission on Civil Rights (1959-62)*, as Chapter IX—*Compulsory Segregation*, pp. 203, *et seq.* (Hereinafter referred to as *North Carolina Advisory Committee Report.*)

[2] *North Carolina Advisory Committee Report*, *op. cit.*, *supra*, note 1, at 203.

[3] Under the North Carolina Pupil Assignment Law "without a single exception, the boards have made initial assignment of white pupils to previously white schools and Negro children to previously Negro schools." United States Commission on Civil Rights, *The Fifty States Report* 477 (1961).

[4] G. S. 122–3–6.

ages,[5] and schools for the blind and deaf,[6] must be segregated as must prisons, county jails,[7] and training schools.[8]

Separate tax books must be kept for white, Negro, Indian and corporate taxpayers.[9]

State law requires racial distinctions where municipalities take possession of existing cemeteries.[10] Some city ordinances designate particular cemeteries for colored persons and specific burial grounds for white citizens;[11] others note simply that places of interment are to be marked for Negroes or for Caucasians.[12] Separate funeral homes must be maintained throughout the state.[13]

Municipalities have also enacted legislation requiring segregation. For example, a Charlotte ordinance, Article I, Section 5, Charlotte City Code, delineates the metes and bounds of the area within which its Negro police have authority. See *North Carolina Advisory Committee Report, op cit., supra*, note 1, at 205. The Director of the North Carolina Department of Conservation and Development, while not requiring segregation in state parks, discourages Negroes from enjoying white facilities. *Id.* at 211.

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[5] G. S. 116–138 to 142.

[6] G. S. 116–109, –120, –124.

[7] G. S. 148–43; 153–51.

[8] G. S. 134–79 to –84; G. S. 134–84.1 to –84.9. On the various forms of segregation in health care, among patients as well as professional personnel, in public as well as private facilities, see *Equal Protection of the Laws Concerning Medical Care in North Carolina, Subcommittee on Medical Care of the North Carolina Advisory Committee to the United States Commission on Civil Rights* (undated) (mimeographed).

[9] G. S. 105–323.

[10] G. S. 65–37.

[11] Charlotte City Code, ch. 7, sec. 7-9, 7-56; Sec. 7-19 of the Lumberton Code; Sec. 8-1, Burlington Code.

[12] Sec. 6-42, Winston-Salem Code; Sec. 7-9, Charlotte City Code.

[13] G. S. 90–212.

North Carolina has also undertaken extensively to regulate so-called "private" relationships. There remains on the books of North Carolina (although invalid in view of decisions of this Court, *Morgan* v. *Virginia*, 328 U. S. 373; *Gayle* v. *Browder*, 352 U. S. 903) a statute requiring racial segregation in passenger trains and steam boats. G. S. 60-94 to-97. The Utilities Commission is directed by G. S. 62-44 and G. S. 62-127.71 to provide separate waiting rooms. Street cars must by statute be boarded white from the front and colored from the rear. G. S. 60-135 to-137. The Corporation Commission has been upheld in requiring enforced segregation on motor buses. *Corporation Comm's.* v. *Transportation Committee*, 198 N. C. 317, 320, 151 S. E. 648, 649 (1930). The opinion emphasizes that separation or segregation "has long been the settled policy" of North Carolina. See G. S. 60-139; *State* v. *Johnson*, 229 N. C. 701, 51 S. E. 2d 186 (1949).

Persons engaged in businesses employing more than two males and females must segregate on the basis of race in toilet facilities. G. S. 95-48. See G. S. 72-46 (1941). Persons operating restaurants and other food handling establishments are required to obtain a permit from the State Board of Health. G. S. 72-46. The State Board inspectors' official form contains as one of the criteria on which restaurants are graded the factor of whether toilet facilities are "adequate for each sex and race." *North Carolina Advisory Committee Report, op cit., supra,* note 1, at 220.[14]

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[14] The premises involved in this case are by law required to be extensively licensed and regulated. No place where food is served can operate without a permit from and inspection by the State Board of Health. G. S. 72-46. A state license is required for the operation of a soda fountain. G. S. 55-79. A license is required for all establishments selling prepared food. G. S. 105-62. Separate licenses are required to sell other items, such as tobacco products. G. S. 105-85. Retail stores must collect sales and use taxes for the state to keep their licenses to do business. G. S. 105-164.4-6.

Fraternal orders may not be authorized to do business in North Carolina if white and colored persons are members of the same lodge. G. S. 58–267. Marriage is forbidden between persons of the Negro and white races by the Constitution of North Carolina, Art. XIV, § 8 (1868); G. S. 14–181 and G. S. 51–3.

Various statutes and ordinances throughout North Carolina require segregation in taxicabs, carnivals, other places of amusement and restaurants. *North Carolina Advisory Committee Report, op. cit., supra*, note 1, at 218, 220-223. Among these ordinances is one of the City of Durham requiring that in public eating places where persons of the white and colored races are permitted to be served, there shall be private, separate rooms for the accommodation of each race. *Id.* at 221.

The foregoing summary does not contain complete information concerning ordinances and executive orders requiring discrimination. Many of the towns and cities do not publish ordinances or executive orders. The Advisory Committee's study of ordinances is incomplete. It is based on the published ordinances of the principal cities in the state and upon the responses of 137 out of approximately 290 city or town attorneys who were requested to search for discriminatory ordinances (*North Carolina Advisory Committee Report, op. cit. supra*, note 1 at 203).

The Attorney General of North Carolina did not submit information concerning ordinances and executive orders requiring discrimination in any of the towns and cities of North Carolina except the town of Monroe and the City of Raleigh. And even with respect to Monroe and Raleigh, the Attorney General indicates in his memorandum the possibility of the existence of a discriminatory "item" of which he may not be "aware" (memorandum of Attorney General submitted herein at the request of the Court, p. 1).

It is not clear whether the Attorney General, in denying the existence of discriminatory executive orders, construed the Court's request concerning such orders to include public statements by the State and local officials proclaiming State policy of discrimination. See *Lombard* v. *Louisiana*, 373 U. S. 267. The local press in which such statements would have appeared, if made, was not available to us.

The State by Its Overall Discriminatory Policies and Statutes Effectively Induced the Proprietor's Act of Discrimination

The State is not insulated from responsibility under the Fourteenth Amendment merely because a private person commits the final act of discrimination. The question, as Mr. Justice Clark has pointed out for the Court, is whether the State in any of its manifestations has, to some significant extent, become involved in the discrimination. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722. The overall discriminatory pattern of state policies and statutes shows such involvement. For, where such patterns exist racial segregation is not a matter of private choice. Rather, such segregation expresses a deep-rooted public policy.

The constitutional right to equal treatment "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly. . . ." *Cooper* v. *Aaron*, 358 U. S. 1, 17. Nor is it only when the State explicitly dictates discrimination by others that their conduct "may fairly be said to be that of the States." *Shelly* v. *Kraemer*, 334 U. S. 1, 13. See *Nixon* v. *Condon*, 286 U. S. 73; *Smith* v. *Allwright*, 321 U. S. 649; *Terry* v. *Adams*, 345 U. S. 461. State "participation", "whether attempted 'ingeniously or ingenuously' ", is just as real when its involvement is nonobvious. *Cooper* v. *Aaron*, *supra*, 358 U. S. at 4, 17; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725. *Cf. Public Utilities Comm'n.* v. *Pollak*, 343 U. S. 451.

As stated by this Court many years ago, ". . . the prohibitions of the 14th Amendment . . . have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken." *Ex Parte Virginia*, 100 U. S. 339, 346-347. So long as the State has meaningfully "[placed] its authority behind discriminatory treatment based solely on color [it] is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment." *Burton* v. *Wilmington Parking Authority, supra*, 365 U. S. at 727 (dissenting opinion of Mr. Justice Frankfurter).

In the case at bar the proprietor refused to serve petitioner because "it wasn't our custom of serving colored people at the fountain sitting at the stools" (R. 14). The State of North Carolina through its pattern of statutes mandating segregation established this community-wide custom. This pattern has as much a coercive effect as a specific ordinance (*Peterson* v. *City of Greenville*, 373 U. S. 244) or as public utterances of officials of a town (*Lombard* v. *Louisiana*, 373 U. S. 267).

Respectfully submitted,

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